Filed 5/3/10 Howe v. Youngreen CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

STANLEY HOWE, **Petitioner and Respondent,** **v.** **KENNETH YOUNGREEN,** **Objector and Appellant.**	**A126580** **(Humboldt County Super. Ct. No. PR080371)**

Respondent Stanley Howe (husband) filed a petition to obtain an order approving the transfer to him of his wife Patricia Howe's community property so that she could qualify for Medi-Cal benefits. (Prob. Code, § 3100 et seq., 3144.)[1] The court granted the petition over the objection of wife's son, appellant Kenneth Youngreen (son). We affirm.

FACTS AND PROCEDURAL HISTORY

Husband and wife have been married for a number of years. Although they have no children together, husband has one adult child from a former marriage and wife has three adult children from a former marriage, including son. On March 1, 1991, the couple placed their community property assets into a revocable living trust (1991 Trust) which by its terms would remain in effect if one of them died while the other remained alive. Upon the death of the surviving spouse, the estate would be distributed as follows:

[1] Further statutory references are to the Probate Code unless otherwise indicated.

50 percent to husband's child Tommy Wayne Howe and 50 percent in equal shares to wife's three children, namely, son, Susan Lynn Hurst, and Thomas Eric Youngreen.

On September 3, 2004, husband and wife signed and had notarized three documents relevant to this appeal. The first was a "Contract to Make Wills And/Or Trust" (the Will Contract) which provided in relevant part, "We agree that we will assure each other that in the event of the death of the first of us to die that the survivor guarantees that upon the death of the last of us to die any estate we have or the proceeds of any estate will be equally divided among our surviving children. [¶] These provisions apply in the event one or both of us fail to create wills or trusts. If we create wills or trusts we guarantee that the provision of those wills or trusts will not be defeated by any later wills or trusts created after the death of the first of us to die."

The second document was an amendment to the 1991 Trust (Trust Amendment) in which the paragraph governing the property to be left to wife's children was changed to correct the spelling of "Youngreen" (spelled "Wongren" in the 1991 Trust): "Fifty percent (50%) thereof in equal shares to Kenneth Allen Youngreen, Susan Lynn Hurst, and Thomas Eric Youngreen by right of representation." The Trust Amendment also changed the successor trustee and added the following paragraph: "[Husband and wife] testify that we have entered into a Contract to make wills and/or a Trust. The contract to make wills and/or Trust is dated September, 2004. This amendment as well as our underlying Trust is subject to the Contract. The terms of the Contract supersede and replace any clause or part of any clause in our wills or Trust created by us that contradict the Contract."

The third document executed on September 3, 2004 was a durable power of attorney signed by wife that gave husband the power to make financial and medical decisions on her behalf in the event of her mental incapacity.

On February 26, 2009, husband, who was then 82 years old, filed a petition under section 3144 seeking the court's approval of a transfer of the couple's community property to himself alone so that wife could qualify for Medi-Cal benefits and so that he would not be impoverished by the use of their assets to pay her medical bills. Husband

indicated in the petition that the property, once transmuted, would be placed into a newly formed revocable living trust containing all of the material provisions of the couple's 1991 Trust and 2004 Trust Amendment. The petition alleged that wife was 79 years old, was currently living in a skilled nursing facility due to dementia, and lacked the legal capacity to authorize the transfer of assets.

Son objected to husband's petition to approve the transfer of assets, arguing that it was effectively a "substitution of judgment" by a conservator under section 2582 and that therefore, the court was required to enforce wife's estate planning. (See § 2582, subd. (f).) He claimed the 2004 Will Contract showed that wife intended that each of the four children receive 25 percent of the estate, contrary to the trust documents specifying that wife's three children would take equal parts of 50 percent of the estate. Son therefore sought an order requiring that counsel be appointed for wife and that the appointed attorney be ordered to draft a trust "reflecting an irrevocable beneficiary provision consistent with the Will Contract."

At the hearing on the petition, and over various objections, the court considered the motion and opposition and their exhibits along with three declarations in lieu of testimony. Husband's declaration stated in relevant part that he and wife never intended to change the division of property set forth in the original trust, and that to the extent the Will Contract provided otherwise, this was a drafting error. Wilma Thompson stated in her declaration that she was wife's best friend, that wife had made it plain to her that she wanted to treat her children and husband's child the same when it came to their inheritance, and that husband had stated to her that he was going to disinherit wife's children because they did not visit her often enough in the nursing home. Son stated in his declaration that Thompson had told him about husband's statements.

The court overruled son's objection and granted husband's petition. It issued a written order which, among other things, (1) directed the transfer of wife's community property interest in the couple's assets to husband as his separate property, (2) terminated the 1991 Trust as amended, and (3) directed the creation of a new trust by husband making the same disposition to the four children as beneficiaries as did the 1991 Trust.

The court specifically found that the property described in the petition was the community property of husband and wife; that wife lacked the legal capacity to transmute the property; that husband had the legal capacity to transmute the property; and that wife was unable to manage her own financial affairs. Son did not request, and the court did not issue, a statement of decision. (See Code Civ. Proc., § 632.)

Son appeals the trial court's judgment.

DISCUSSION

Son does not argue that the trial court erred in authorizing the transfer of wife's community property to husband for the purpose of making her eligible for Medi-Cal benefits. Rather, he claims the court should have enforced the 2004 Will Contract by ordering husband to place the property in an irrevocable trust dividing the estate into equal 25 percent shares between husband's son and each of wife's three children. (See § 21700 [contracts to make will or other instrument].) Son makes a number of arguments in support of this contention, each of which assumes—incorrectly—that the 2004 Will Contract requires such a disposition.

The standard for interpreting trust documents was set forth in *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 452-453: "[I]t is proper for the trial court in the first instance and the appellate court on de novo review to consider the circumstances under which the document was made so that the court may be placed in the position of the testator or trustor whose language it is interpreting, in order to determine whether the terms of the document are clear and definite, or ambiguous in some respect. [Citation.] Thus, extrinsic evidence as to the circumstances under which a written instrument was made is admissible to interpret the instrument, although not to give it a meaning to which it is not reasonably susceptible. [Citation.] On review of the trial court's interpretation of a document, the appellate court's proper function is to give effect to the intention of the maker of the document. [Citation.]" In the absence of a formal statement of decision by the trial court, we look only to the final order or judgment to determine error and we presume that order or judgment to be correct. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

The 2004 Will Contract signed by husband and wife provides that upon the death of the last surviving spouse, the proceeds of the estate would be "equally divided among our surviving children." But it also states, "These provisions apply in the event one or both of us fail to create wills or trusts." This provision creates a condition; i.e., "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." (Rest. 2d Contracts, § 224(e); see Civ. Code, § 1436.)

Husband and wife created their Trust in 1991 and amended it in 2004. Hence, the condition necessary to trigger the property division set forth in the Will Contract (the failure by husband or wife or both to make a will or trust) did not occur. The property division set forth in the 1991 Trust and 2004 Trust Amendment, under which husband's child will receive 50 percent of the estate and wife's children will share equally in the other 50 percent, is controlling.

Son notes that the 2004 Trust Amendment, executed on the same day as the Will Contract, provides, "The terms of the Contract supersede and replace any clause or part of any clause in our wills or Trust created by us that contradict the Contract." This language incorporates the Will Contract, but it does not change its meaning: that the estate would be divided equally among the four children in the event husband or wife failed to make a will or a trust. Were we to construe the Trust Amendment's incorporation of the Will Contract in the manner suggested by son—to require an equal division of 25 percent each between the four children—this would directly contradict other language in the Trust Amendment more specifically describing the property disposition as "Fifty percent (50%) thereof in equal shares to Kenneth Allan Youngreen, Susan Lynn Hurst, and Thomas Eric Youngreen by right of representation." "The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative." (§ 21120.)

The extrinsic evidence considered by the trial court does not require a different interpretation. Husband's declaration stated that he and wife always intended to give half of their estate to each side of their family, as specified in the 1991 Trust and 2004 Trust

Amendment. The 2004 Will Contract was not supposed to change this, but was signed to "make sure our property would go the way we wanted it to go in case we did not get around to making a will or trust before we died, or in case there was something wrong with our wills or trusts." This is consistent with the plain language of the Will Contract, to the extent that contract applies only in the event that husband or wife failed to make a valid will or trust. The declaration of Wilma Thompson that wife had "made a plan where all of the children . . . would be treated equally in inheriting all the property" does not contradict the Will Contract's language stating that it only applied if no will or trust was made.[2]

Because the 2004 Will Contract does not supersede or otherwise abrogate the disposition of property set forth in the 1991 Trust and 2004 Trust Amendment, son was simply not entitled to the relief he sought. We therefore reject his related arguments that the court failed to properly consider wife's testamentary intent when it effectively granted a petition for substituted judgment under section 2580, that it deprived son of a vested property interest, and that it based its ruling on a misunderstanding regarding husband's eligibility for Medi-Cal.[3] We note that the trial court's order resulted in the creation of a living trust by husband that maintains the same division of property among the four children as did the 1991 Trust and 2004 Trust Amendment. We express no opinion as to what remedies, if any, would be available to son should husband at some point in the future alter this disposition.

---

[2] Husband objected to this aspect of Thompson's declaration as hearsay. We assume, without deciding, that the trial court did not err in overruling this objection. (See Evid. Code, § 1260, subd. (a) ["Evidence of a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule."].)

[3] To the extent these arguments are based on the trial court's oral comments at the hearing, we would also reject them based on son's failure to procure a statement of decision. Because a trial court retains inherent authority to change its decision, its findings of fact, or its conclusions of law at any time before entry of judgment, the judgment supersedes any tentative decision or any oral comments from the bench. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268.)

MOTION FOR SANCTIONS

Husband has filed a separate motion seeking an order that son pay over $19,000 in attorney fees as a sanction for pursuing an appeal that is frivolous and brought solely for the purposes of delay. (Code Civ. Proc., § 907, Cal. Rules of Ct., rule 8.276(a)(1).) This is not a case warranting sanctions. Our review was essentially de novo, involving the interpretation of and interplay between trust documents and a contract to make a will. Son did not prevail, but he presented a cogent argument which, we conclude, was not frivolous. "Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

DISPOSITION

The judgment (order granting husband's petition) is affirmed. Husband's motion for sanctions is denied. Son is ordered to pay husband's ordinary costs on appeal.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.